No. 80-1209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHRISTINE O'BISO,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Should certiorari be granted when it is clear that the two-year Statute of Limitations contained in the New Jersey Tort Claims Act is the most analogous State statute for actions brought against public entities in New Jersey under 42 U.S.C. § 1983?

2. If the Supreme Court grants certiorari and decides adversely to Respondent on Question #1, is not Petitioner, whose claim has already been decided adversely to her in State proceedings, barred from raising the same issue again by the doctrines of *res judicata* and collateral estoppel?

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Statement of the Case

O'Biso was employed by the Lincoln Park Board of Education for the 1974-1975 school year. (A. 11a) During that time, she failed to maintain proper control and discipline of her classroom. (A. 12-14a) As a result, the Board indicated on April 8, 1975 that it probably would not renew her contract. (A. 15a) After she was informed of this tenta-

tive decision, she cried and asked her students to assist her. (A. 16-17a) As a result, pupils walked out of her classes, loitered in the halls, posted signs in the school corridors and broke a window. (A. 16a) Formal action by the Board not to rehire O'Biso occurred on April 15, 1975. (A. 18a)

On April 30, 1975, the Board notified O'Biso of the following reasons for the Board's decision not to renew her contract:

> "1. Insufficient protection of school property during the past year; in particular, vandalism of the art room which took place during your class teaching time.
>
> 2. Unsatisfactory classroom performance during the past year; in particular, failure to maintain proper control and discipline of your pupils.
>
> 3. Inadequate care of school equipment and furnishings during the past year; in particular, failure to maintain a proper appearance in the art room in the Chapel Hill School.
>
> 4. Conduct unbecoming a professional during the past year; in particular, your efforts to actively enlist the support of your pupils in the cause of your continued employment by the Board of Education.
>
> 5. The doubts expressed by your building principals concerning the continuation of your employment by the Board of Education." (A. 11a)

O'Biso filed a petition with the Commissioner of Education of the State of New Jersey, alleging, among other things, that Reason No. 4 constituted a violation of her

Constitutional right to freedom of speech. (A. 19a) On April 22, 1977, a hearing examiner found against O'Biso. (A. 21a) On August 2, 1977, the Commissioner of Education found against O'Biso. (A. 22a) The State Board of Education affirmed on November 9, 1977. (A. 23a) O'Biso failed to file a timely appeal with the State Court (A. 24a)

On December 11, 1978, almost forty-four (44) months after the Board's action, O'Biso filed a Complaint in the United States District Court under 42 U.S.C. 1983, again alleging the same violation of her Constitutional rights. (A. 3a) The District Court granted the Board's Motion for Summary Judgment on the ground that the claim was barred by the applicable Statute of Limitations. (A. 1-6a) The Court of Appeals affirmed the Order of the District Court. (A. 7a)

POINT I

Certiorari should not be granted because it is clear that the two-year Statute of Limitations contained in the New Jersey Tort Claims Act is the most analogous State statute for action brought against public entities in New Jersey under 42 U.S.C. § 1983.

Because Congress did not provide a Federal Statute of Limitations for Section 1983 claims, the Courts have repeatedly held that the timeliness of such actions must be determind by applying the most analogous limitation provisions of the Statutes of the relevant State. *Board of Regents* v. *Tomanio,* 64 L.Ed. 2nd 440 (1980); *O'Sullivan* v. *Felix,* 233 U.S. 318 (1914).

The only question at issue is the most analogous New Jersey Statute for the Federal Court to apply. Both the District Court and the Court of Appeals held that the two-year Statute of Limitations contained in the *New Jersey Tort Claims Act,* N.J.S.A. 59:8-8, was the most analogous State Statute for claims that are brought under Section 1983 against public entities in the State of New Jersey. That Statute sets forth the limitation period for any "injury to person or property" brought against a public entity (N.J.S.A. 59:8-8) and broadly defines an injury to include "any other injury that a person may suffer that would be actionable . . ." (N.J.S.A. 59:1-3).

This is not the first case in the Third Circuit to apply the two-year Statute of Limitations in the New Jersey Tort Claims Act to a 1983 action. In 1979, Judge Gerry reached an identical conclusion in *Gipson* v. *Township of Bass River,* 82 F.R.D. 122 (D.N.J. 1979). In that case, a landowner brought a 1983 action against the Township of Bass River and members of the local Board of Adjustment for an alleged deprivation of civil rights in connection with the denial of a zoning variance. The District Court held that the New Jersey Tort Claims Act's Statute of Limitations controlled in a 1983 action against a public entity over the general provisions of N.J.S.A. 2A:14-1 and N.J.S.A. 2A:14-2.

A New Jersey Appellate Court has also applied the New Jersey Tort Claims Act's two-year Statute of Limitations to an analogous case against a municipality. In *Martin* v. *Township of Rochelle Park,* 144 N.J. Super. 216 (App. Div., 1976), an owner of a diner brought an action against the Township of Rochelle Park and charged it with unequal treatment and bad faith discrimination against her in favor of a motel operator. The Appellate Division of the New Jersey Superior Court held that the complaint

was barred by the Statute of Limitations contained in the New Jersey Tort Claims Act.

The Second Circuit has also applied New York Tort Claims Act limitations periods to 1983 cases. See *Fine* v. *City of New York,* 529 F. 2d 70 (2nd Cir., 1976) and *Lombard* v. *Board of Education of the City of New York,* 440 F. Supp. 577, 584 (E.D. N.Y., 1977)

Petitioner, in her brief, has attempted to cloud these clear Statute of Limitations authorities by citing recent Supreme Court decisions dealing with the qualified immunity and notice provisions of Tort Claims Acts. Neither the qualified immunity nor the notice provisions of Tort Claims Acts have any relevance to the question of whether the Statute of Limitations provisions of the New Jersey Tort Claims Act is the most analogous limitation statute here.

Owen v. *City of Independence,* 63 L. Ed. 2d 673 (1980), cited by Petitioner, dealt with the question of whether the good faith defense was applicable to 1983 actions. Nowhere in that opinion is there the slightest hint that it has any applicability to Statute of Limitation questions.

Petitioner points to Justice Powell's dissent which lists sixteen State Tort Claims Acts, among them, the New Jersey Act. (*Ibid,* at 713) The section cited by Justice Powell, however, is the qualified immunity section, not the section which imposes the two-year Statute of Limitations!

Petitioner also cites *Board of Regents* v. *Tomanio,* 64 L.Ed. 2d 440 (1980), a case decided a month after *Owen.* That case did apply a three-year New York Statute of Limitations and in so doing, held that the Statute was not tolled by state court proceedings. *Tomanio,* far from undermining, strongly supports Respondent's position. In

applying the New York limitation period to the 1983 action, Justice Rehnquest said:

> "On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." (*Ibid,* at 449)

See also *Johnson* v. *Railway Express Co.,* 421 U.S. 454 (1975)

Petitioner next suggests that it is "inconsistent with the Constitution and laws of the United States" (42 U.S.C. § 1988) to apply the two-year New Jersey Tort Claims Act rule. The primary relief sought by the Petitioner is not damages, but rather reinstatement. She cannot obtain reinstatement by suing the individual members of the Board of Education. She can only sue the Board itself. The Board, however, is a public body. It has a budget to prepare which it must submit to the voters every year. Under those circumstances, it is not unreasonable nor inconsistent with the Federal Constitution to require that suits against public bodies be brought within two years, rather than within six years.

It is impossible to separate the identity of the defendant in this case from the nature of the tort. The tort here is the alleged misconduct of a public body in not renewing a non-tenured teacher's contract because of her unprofessional conduct in crying in front of her students and seeking to enlist their support for her personal benefit, i.e. keeping her job. The alleged tort is peculiarly attributable to governmental action. It is an allegation of governmental misconduct, not an allegation of private misconduct.

O'Biso points to the "potential of duplicitous litigation" that develops from the District Court's decision for a two-year Statute of Limitations for public entities and the possible six-year Statute of Limitations for public employees. Judge Gerry dealt with this point in *Gipson, supra,* as follows:

> "However, the Third Circuit has recently stated that 'for Statute of Limitations purposes, each complaint and different aspects of the same complaint may be treated dfferently'. *Davis* v. *U.S. Steel Supply,* 581 F. 2d 335, 341 (3rd Cir., 1978)" *Gipson* v. *Township of Bass River, supra* at p. 129.

A complaint against an individual employee is by nature different from a complaint regarding a public action of a public body. In *Martin* v. *Township of Rochelle Park, supra,* the six-year Statute of Limitations was held to apply to the Township Attorney in his individual capacity but the two-year Statute of Limitations was held to apply to the Township body. In any event, no individual public official was sued by O'Biso and the matter of the Statute of Limitations with respect to such individual official is not here in issue.

Petitioner finally cites *Donovan* v. *Reinbold,* 433 F 2d 738 (9th Cir., 1970). That case dealt primarily with the inapplicability of The California Tort Claims Act to a suit against individual public employees. It is not relevant to the question of the most analogous State Statute of Limitations in a suit against a public entity itself.

POINT II

The judgments of the Court of Appeals and the District Court can also be sustained on the grounds of *res judicata* and collateral estoppel, since petitioner's claim was already decided adversely to her in the State proceedings.

In its opinion, the District Court noted the questions of *res judicata* and collateral estoppel present in the fact that O'Biso had previously initiated statutory proceedings before the Commissioner of Education and the State Board of Education in which the very same issue of alleged Constitutional infringement had been presented and decided adversely to her. (A. 2-3a) The Court noted that she had the right to appeal, but failed to appeal in time to the Appellate Division of the New Jersey Superior Court. The Court found it unnecessary to decide the issue of *res judicata* because of its decision that the claim was barred in any event by the applicable Statute of Limitations.

Should the Supreme Court grant certiorari and find adversely to the Board on the Statute of Limitations question, we ask the Court to consider the questions of *res judicata* and collateral estoppel.

O'Biso was represented by her present counsel at every stage of the administrative proceedings. (A. 10a) She testified at length before the Hearing Examiner and submitted 16 separate exhibits in support of her claim. The matter was not ruled upon immediately, but was adjourned to allow time for her counsel to submit a brief, which he did, in opposition to the Board's Motion to dismiss. (A. 11a) After consideration of the exhibits, O'Biso's testimony, and the briefs of the parites, the Board's Mo-

tion to dismiss was granted. The decision was subsequently adopted by the Commissioner and thereafter affirmed by the State Board of Education. (A. 22-23a)

In that hearing, O'Biso admitted she stopped pupils on the way to school and that she was crying when she told the pupils that she was not to be re-employed. (A. 17a) She also admitted that she asked her pupils to have their parents write letters and to call Board members on her behalf, that her pupils became disruptive, that they walked out of classes, loitered in the halls, posted signs on the school corridors which read: "Save Miss O'Biso," and that one pupil broke a window. (A. 16a)

The State Board of Education, the Commissioner of Education, and the Hearing Examiner all found that the Board acted properly in listing as one of five reasons for not rehiring O'Biso her unprofessional conduct in enlisting pupils in the cause of her continued employment.

Petitioner's appeal of the decision to the State Court was dismissed because it was not filed in time. (A. 24a)

Res judicata and collateral estoppel apply to quasi-judicial administrative proceedings so long as the agency had jurisdiction over the subject matter and over the individual. *Cornwell* v. *Ferguson,* 545 F. 2d 1022 (5th Cir., 1977); *Frazier* v. *East Baton Rouge Parish School Board,* 363 F. 2d 861 (5th Cir., 1966); *cf. Whitner* v. *Davis,* 410 F. 2d 24 (9th Cir., 1969). Accordingly, the finding by the State Board of Education that there was no violation of O'Biso's Constitutional rights is *res judicata.* At the very least, she is barred from raising the same issue again by the doctrine of collateral estoppel.

CONCLUSION

For the reasons set forth in this brief, Certiorari should be denied.

Respectfully submitted,

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Dated: February 5, 1981